

DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CACR05-1127

JUNE 14, 2006

ADELL WALLACE

APPELLANT

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR04-5108]

HON. JOHN W. LANGSTON, JUDGE

V.

STATE OF ARKANSAS

APPELLEE

AFFIRMED

This case involves a discrepancy between a verdict pronounced in open court and the verdict shown by the written judgment. Appellant Adell Wallace and a co-defendant were tried in a bench trial on the charge of possession of marijuana with intent to deliver; in the same trial, Wallace was tried on the additional charge of theft by receiving. Wallace does not challenge the trial court's conclusion that he was guilty of the drug charge. His sole point on appeal is that the trial court erred in sentencing him for theft by receiving because it never found him guilty of that crime. We agree with the State that his arguments are without merit; therefore, the conviction is affirmed.

The charges in this case resulted from a traffic stop of a vehicle that Wallace owned and was driving on September 21, 2004. According to officers of the Sherwood Police Department, the vehicle displayed a stolen license plate, and a strong smell of marijuana

emanated from the vehicle when the officers approached. Wallace was arrested for theft by receiving because of the stolen license plate.¹ Additionally, when an inventory search of the vehicle revealed two bags of marijuana under the passenger seat, Wallace and his passenger were arrested for possession of marijuana with intent to deliver.

Each defendant was charged in the Pulaski County Circuit Court. The information against Wallace was for felony possession of marijuana with intent to deliver (Count 1) and misdemeanor theft by receiving (Count 2). His passenger was charged only with Count 1.

At a bench trial on April 27, 2005, Wallace and his passenger were each represented by an attorney. After all evidence was presented, each attorney renewed motions for dismissal that had been made previously. The circuit court pronounced each defendant “guilty of possession of a controlled substance, to-wit, marijuana” but made no mention of the theft-by-receiving charge against Wallace. No objection was raised, and there was no request for an additional ruling. The trial court’s docket entry for Wallace’s trial reflects the following:

Ct Trial– both sides stipulate substance & amount & Lab Report
def found guilty– Presentence Report ordered– Sentencing Set 5-20-05 8:30 a.m.

Subsequent docket entries show that Wallace waived the thirty-day sentencing requirement, *see* Ark. Code Ann. § 16-90-105(b) (1987), and was sentenced on June 6,

¹Wallace was also arrested for driving on a suspended driver’s license, failing to have proof of insurance, and failing to register his vehicle. The record before us shows no information filed on these charges.

2005. The record shows that the following colloquy transpired at the beginning of the sentencing hearing:

THE COURT: About the last time we were here there was a question as to the, my question as to what this conviction was for. ... [E]ach of the defendants were charged with possession of marijuana with intent to deliver, and my two questions were because of what was written on the docket sheet, are these felonies, or are these misdemeanors? And if so, in any event, how much marijuana was involved?

PROSECUTOR: Item 1 was 107.5 grams of marijuana, and 1B was 23.6 grams of marijuana.

. . . .

THE COURT: Okay. And was the conviction, was it for possession with intent to deliver marijuana, or was it just possession of marijuana? That was—

PROSECUTOR: The convict— the trial was for possession of marijuana with intent to deliver and that was— My understanding was there was no reduction of the charges, and they were found guilty as they were charged.

The court inquired whether each defendant's counsel agreed with this statement by the prosecutor, and each attorney said "yes."

The court then addressed each defendant separately, orally sentencing Wallace as follows:

Defendant's going to be placed on probation for a period of five years upon his paying a fine of \$500.00 fine and costs, complying with written conditions of probation. This will be on Count 1. Drug treatment will be ordered On Count 2 be one year probation, \$100.00 fine and costs, and this will be concurrent.

The judgment and disposition order for Wallace was filed on June 27, 2006. It reflects the finding of guilt, five years' probation, and \$500 fine for Count 1, possession of marijuana

with intent to deliver. Count 2, theft by receiving, shows the finding of guilt, twelve months' probation, and \$100 fine.

Wallace's sole point on appeal is that the trial court erred in sentencing him for misdemeanor theft by receiving when the court never found him guilty of that crime. He urges this court to adopt the holdings of other jurisdictions and "find that silence as to guilt or innocence amounts to an acquittal." *See State v. Daniels*, 103 P.3d 249 (Wash. Ct. App. 2004). Wallace argues that, should acquittal be found on the basis of the court's silence, double jeopardy is implicated and the theft-by-receiving conviction must be dismissed. He argues that his sentence was illegal if it was in violation of double-jeopardy principles and that procedural defects should not bar our consideration of the merits of his argument.

Judgment and commitment orders are effective only upon entry of record, and the trial court may modify a sentence pronounced in open court prior to entry of judgment so long as it complies with other pertinent criminal rules. *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003); *Bush v. State*, 90 Ark. App. 373, ___ S.W.3d ___ (2005). Furthermore, an oral order is not effective until set forth in writing and filed of record. *Bush, supra*; *Hankins v. State*, 84 Ark. App. 370, 141 S.W.3d 905 (2004). Our supreme court, reasoning as follows, has rejected an appeal of a criminal conviction where the trial judge failed to formally pronounce the verdict of guilty:

The criminal code requires that pronouncement, and the trial judge should make it in every case. Nevertheless, the appellants were represented by counsel, made no objection, did not file a motion for a new trial, and have not suggested in their appellate brief any possibility of prejudice as a result of the omission. It is necessary

to raise an issue in the trial court before we will consider it on appeal. Further, there was no prejudice in the omission.

Willis v. State, 299 Ark. 356, 357, 772 S.W.2d 584, 585 (1989) (citing Ark. Code Ann. § 16-90-106(b) (1987)).

Although the illegality of a sentence can be raised for the first time on appeal, a sentence given within the prescribed law is not illegal on its face and cannot be raised unless it first was raised to the trial court. *Ewings v. State*, 85 Ark. App. 411, 417, 155 S.W.3d 715, 719 (2004). Similarly, the appellate court will not address a question of double jeopardy if it was not raised below. *Hodge v. State*, 320 Ark. 31, 894 S.W.2d 927 (1995).

Here, as in *Willis, supra*, the appellant was represented by counsel, no objections were made to sentencing, no motion for new trial was filed, and there is no allegation of prejudice due to the lack of a pronouncement in open court. Under *Willis*, silence does not amount to an acquittal, and there is no implication of double jeopardy based on a discrepancy between the oral pronouncement and written judgment in this case.

Wallace was sentenced for this Class A misdemeanor to one year's probation and a \$100 fine, well within the range allowed by statute. *See* Ark. Code Ann. § 5-36-106(e)(3) (Supp. 2003), § 5-4-401(b)(1) (1987), and § 5-4-201(c)(1) (1987). Thus, his sentence is not illegal on its face and cannot now be challenged. The issues of double jeopardy and the trial court's failure to orally pronounce sentence were not raised below, and they cannot be raised for the first time on appeal. The conviction for theft by receiving is affirmed.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.